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No. 91-1831

In The

Supreme Court of the United States

October Term, 1991

THOMAS W. CARROLL, et al.,

Petitioners,

v.

DONALD M. BLINKEN, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND AVERELL SMITH, ET AL., IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND AVERELL SMITH, ET AL., IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and the objecting students in *Smith v. Regents of the University of California*, 2 Cal. App. 4th 750 (1992) (review granted by the California Supreme Court March 26, 1992, No. S006588), respectfully move this Court for leave to file the attached amicus curiae brief in support of petitioners, Thomas W. Carroll, *et al.* Consent to the filing of this brief has been granted by counsel for

petitioner and has been lodged with the Clerk of this Court. Respondents, Donald M. Blinken, *et al.*, have withheld their consent, thus necessitating the filing of this motion.

IDENTITY AND INTERESTS OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

The objecting students in *Smith*, led by Averell Smith, have been challenging the University of California's use of mandatory student fees for political and ideological activities for 13 years. The outcome of this case will greatly affect the *Smith* students' efforts to vindicate their constitutional rights.

PLF is submitting this brief because it believes its public policy perspective and litigation experience in the compelled fees area (be they student fees, agency shop

fees, or state bar dues) will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous cases before this Court including amicus curiae participation in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Gibson v. Florida Bar*, No. 90-1102, *cert. dismissed*, 502 U.S. ___, 116 L. Ed. 2d 432 (1991); and *Lehnert v. Ferris Faculty Association*, 500 U.S. ___, 114 L. Ed. 2d 572, *reh'g denied*, 115 L. Ed. 2d 1044 (1991). Recently, PLF attorneys represented the appellants in *Keller v. State Bar of California*, 495 U.S. ___, 110 L. Ed. 2d 1 (1990) (limiting the integrated bar's ability to spend objecting members' dues for political activities). Additionally, PLF attorneys represent objecting students in *Smith v. Regents of University of California*, 2 Cal. App. 4th 750 (ongoing litigation challenging the political use of mandatory student fees; petition for review granted March 26, 1992). PLF believes the Second Circuit Court's opinion incorrectly analyzes the holdings of this Court which protect people from involuntarily subsidizing views they deplore through the collection of mandatory fees.

For the foregoing reasons, Pacific Legal Foundation and Averell Smith, *et al.*, request that the motion to file the amicus curiae brief which follows be granted.

DATED: June 10, 1992.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTERESTS OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceding motion and are adopted herein.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992). The court held, *inter alia*, that mandatory student fees could be used to promote political and ideological views and activities with which they

disagree, so long as those views and activities occurred on the campus on which the fees were collected.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1 lists among the considerations governing review on certiorari the circumstance when a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort, as to call for an exercise of this Court's power of supervision. Rule 10.1(c) includes as a ground for review when a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court or has decided a federal question in a way in conflict with applicable decisions of this Court. All three of these grounds for review are present in this case.

I

THE DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS

The First Amendment protects more than the right to speak. It also protects the right to refrain from speaking, thereby ensuring that the choice to enter public dialogue at all remains in the hands of the individual rather than the state. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court recognized that the "fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works

no less an infringement of their constitutional rights." *Id.* at 234 (footnote omitted). Therefore, compelled speech is as equally repugnant to the First Amendment as compelled silence. *See also Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 782 (1988).

The Third and Fourth Circuit Courts of Appeals have both addressed the compulsion of financial support for political activities from students by public universities and come to the opposite conclusion than the Second Circuit. In *Galda v. Rutgers* (*Galda II*), 772 F.2d 1060 (3d Cir. 1985),[1] students challenged their state university's policy of funding the New Jersey Public Interest Research Group (NJPIRG), which (like the New York Public Interest Research Group (NYPIRG) organization at issue in *Carroll*) actively promoted a political and ideological philosophy with which the students disagreed.

The Third Circuit court held: "[B]ecause the educational component is only incidental to the organization's ideological objectives, the educational benefits are not adequate to overcome the constitutional objections." *Galda II*, 772 F.2d at 1061.[2] *Galda II* carefully analyzed the

---

[1] The *Galda II* court states that it is not concerned with the question whether an organization with NJPIRG's philosophic outlook may be funded through the general activities fund as are other campus organizations representing diverse views. However, the language in the opinion is directly applicable to this case and conflicts with the Second Circuit opinion.

[2] The Third Circuit first addressed the NJPIRG funding problem in *Galda v. Bloustein* (*Galda I*), 686 F.2d 159 (3d Cir. 1982). The court held that in contrast with the subsidized student newspapers and guest speaker programs upheld in *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb.), *aff'd*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974); and

(Continued on following page)

alleged benefits students received by forced subsidization of NJPIRG. The educational benefits cited in *Galda II* track almost exactly those put forth in *Carroll*, 957 F.2d at 1000. In *Galda II*, the educational benefits included

> "learning to advocate and thoroughly learning their adversary's position in order to rebut them", forcing students to "publicly campaign and promote an organization", providing an opportunity "to investigate, research, write, and advocate their positions before governmental agencies," providing "students with leadership opportunities," and "teaching students to function as citizens."

Galda II, 772 F.2d at 1062. These "educational" interests are obviously applicable only to those students who actively participate in NJPIRG's ventures. Such participants are also, presumably, supporters of NJPIRG's messages and methods. Those students who do not support NJPIRG—those who are forced to contribute to it against

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Arrington v. Taylor, 380 F. Supp. 1348 (M.D.N.C. 1974), *aff'd*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976), NJPIRG does not provide a "forum" for the expression of differing views. Rather, NJPIRG's political stance is determined by its student board of directors, and students working for NJPIRG are foreclosed from supporting contrary positions unless such support is "okayed by the state board." *Id.* at 165-66.

> Put simply, the educational component of PIRG cannot serve to obscure the underlying substance of plaintiff's complaint: that all [Rutgers] students were obliged to finance what allegedly amounted not to a "classroom" to foster the effective presentation of the students' views, but rather to fund a political entity devoted to the attainment of certain fixed ideological objectives.

Id. at 166.

their will—are not going to be active participants in NJPIRG. Therefore, this interest is inconsequential to student objectors.

Furthermore, the Third Circuit correctly noted that protecting dissenting students' rights has no adverse effect on the marketplace of ideas: A case to protect student's rights does not "present the issue of whether PIRG or any other organization may be restricted in the expression of its views on campus or elsewhere. Nor does this case in any way question PIRG's right to finance its operations by voluntary contributions from those who agree with its objectives." *Galda II*, 772 F.2d at 1064. The court noted that NJPIRG does not provide a forum for the expression of differing views but is a "group."

> The educational advantages described in the testimony do not differ from those that might be obtained by working with, or for, an independent organization such as the Republican or Democratic Party, or a clearly religious group which has undertaken an active and vigorous proselytizing program. As we have said, "it could not be seriously contended that student fees could be funnelled to such a group." Yet, the educational component that the University presents here as justification would be precisely the same were the recipient group one that clearly could not receive affirmative state support.

Id. at 1065 (citations omitted). The case at bar is indistinguishable from *Galda* in this respect. Moreover,

> [a]lthough the training PIRG members may receive is considerable, there can be no doubt that it is secondary to PIRG's stated objectives of a frankly ideological bent. To that extent the

> educational benefits are only "incidental"—arising from or accompanying the principal objectives—and subordinate to the group's function of promoting its political and ideological aims.

Id. at 1065. In *Galda II*, the University presented no evidence, nor did the court believe it could, that the educational experience which it cites as justification could not be gained by other means which do not infringe the students' constitutional rights. *Id.* at 1067. In this case the court specifically notes that students do obtain the same lessons as NYPIRG provides through the university's offer of classroom instruction specifically geared toward civic participation. *Carroll*, 957 F.2d at 1000.

The *Galda II* court concluded its analysis by noting that the objection to funding an outside entity through the "neutral funding" procedure by which all groups theoretically may be funded is that the result achieved is not neutral and does not achieve equal access. The process permits majoritarian groups to compel support from minorities in circumstances where no compelling state interest justifies the limitation on the First Amendment rights of minorities. *Id.* at 1067. Contrary to this language, the court below requires students with minority viewpoints to subsidize political activities with which they disagree.

The Fourth Circuit has addressed these issues from a different angle. In *Maryland Public Interest Research Group v. Elkins*, 565 F.2d 864 (4th Cir. 1977), the court decided whether a university can forbid a recognized student organization (MaryPIRG) to use its share of the mandatory activities fees for litigation. The court held that the university *may* restrict the funds so that they may not be used for that purpose. *Id.* at 866. The university stated that it had restricted the funds because it "squared

with the University's obligation to all students: to expend funds only for educational purposes." *Id.* Litigation, it is implied, is not an educational purpose.

> There is no affirmative commandment upon the University to activate MaryPIRG's exercise of First Amendment guarantees; the only commandment is not to infringe their enjoyment. . . . In reality, the plaintiff [MaryPIRG] is asking the Board to finance the plaintiff's assertion of the Amendment. In this it cannot succeed.

Id. at 866. The court stated the university "may put the cost thereof upon those who exercise [First Amendment rights] rather than upon those who simply abide it." *Id.* Beyond this, to protect the First Amendment rights of students who disagree with the speech, the university *must* put the cost on those who *exercise* First Amendment speech rights, it *may* place the cost on those who *tolerate* the speech, but is *forbidden* to put the cost on those who *object* to the speech.[3] The Second Circuit's conflict with the decisions of this Court and of the Third and Fourth Circuits should be resolved before more students' rights

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[3] The Fourth Circuit also addressed the use of mandatory student fees to fund the student newspaper in *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983). This case is the sequel to *Arrington* (*see supra* Note 2), asking the court to review the challenge in light of *Abood v. Detroit Board of Education*, 431 U.S. 209. The *Kania* court distinguished *Abood* on its facts and decided that *Arrington* correctly held that student fees could be used for the student newspaper. The Fourth Circuit's focus is mistakenly on the differences between a union and a university, instead of on the similarities of the constitutional violations. This Court now has the opportunity to harmonize the union cases which protect dissenters' First Amendment rights, and the Second Circuit's opinion in this case, which requires students to subsidize political speech they abhor.

are violated. Therefore, this Court should grant review to consider and decide this important issue.

II

THE DECISION IS IN CONFLICT WITH THE DECISIONS OF CERTAIN STATE SUPREME COURTS

Surprisingly, the issue now brought before this Court has only rarely been addressed by the highest courts of the states. This Court's decision in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), prompted students in Nebraska, Vermont, and Washington to challenge the use of their mandatory student activity fees for political purposes. The students met with defeat in the first two cases but won a partial victory in the third. In *Larson v. Board of Regents of the University of Nebraska*, 189 Neb. 688, 204 N.W.2d 568 (1973), the Nebraska Supreme Court held that despite the language in *Street*, mandatory student fees to support the campus newspaper, the student association, and a speaker's program did not violate the students' constitutional rights. The basis for the court's opinion was that the students did not prove only one political point of view was supported by such fees. *Id.* at 571.

In *Lace v. University of Vermont*, 131 Vt. 170, 303 A.2d 475 (1973), students complained of coerced subsidization of "radical" causes at the state university. The Vermont Supreme Court, also distinguishing the educational setting from the union situation in *Street*, held the students did not present a justiciable controversy because they did not plead and prove that they were unable to make their own views known on campus. Furthermore, the students did not prove they were denied equal and proportional

access to student association funds to present views with which they agreed. *Id.* at 479. Essentially, this ruling mirrors *Larson*.

In Washington, students at least found a court willing to accept that First Amendment rights were implicated. That state's Supreme Court addressed this issue in *Good v. Associated Students of the University of Washington*, 86 Wash. 2d 94, 542 P.2d 762 (1975). The students successfully challenged the university's allocation of mandatory student fees to a nonprofit corporation purporting to represent all university students and engaging in political and ideological activities with which the students disagreed. Although the students based their claim on *Street*, the Washington Supreme Court resolved the dispute on state statutory grounds. The court first noted that the nonprofit corporation was an agency of the university and subject to the ultimate control of the university's board of directors. *Id.* at 764. Therefore, the court held, students could be required to pay the fee unless the corporation exceeded the statutory purposes for which fees could be used or the corporation espoused only one particular political, social, economic, or religious viewpoint. *Id.* at 766, 769. Because the parties did not brief the issue of whether the corporation espoused only one viewpoint in the lower courts, the Supreme Court remanded for trial on that issue. *Id.* However, the Washington court did hold that the university could not compel all students to be members of the nonprofit corporation on the grounds that the students have a right *not* to associate.

> There is no room in the First Amendment for such absolute compulsory support, advocation and representation. We recognize that First Amendment rights are not absolute, but the university presents no arguments or facts to justify

> any exception, narrow as it would have to be, which might exist if a compelling state interest were presented.

Id. at 768.

These three cases were all brought in response to this Court's decision in *Street*. However, the language in that one case was apparently insufficient to instruct the state Supreme Courts in the proper response to the use of mandatory student fees for political purposes. Since *Street*, however, this Court has revisited the constitutional problems inherent in the collection of compelled dues several times. In *Abood*, *Ellis*, *Hudson*, *Keller*, and *Lehnert*, this Court has emphasized and reemphasized the constitutional infirmity of any state action that allows compelled fees to be used for political purposes. This Court has already specifically held that *teachers* cannot be forced to subsidize political activities with which they disagree. *Hudson*, 475 U.S. at 310; *Lehnert*, 114 L. Ed. 2d at 591. Certainly *students* must have the same constitutional rights. Therefore, this Court should grant review to guide state as well as federal courts in the proper application of constitutional principles to this issue.

III

THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT

The Second Circuit's approach to this issue should be compared to how this Court has viewed the special nature of speech involving issues of public importance:

> By utilizing petitioners' funds for political lobbying and to garner the support of the public

> in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion. Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible.

Lehnert, 114 L. Ed. 2d at 591 (opinion of Blackmun, J.) (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)) (citations omitted). The only way to reconcile this language with the facts of the present case is to assume that college students have less First Amendment rights than the college professors in *Lehnert*. That assumption, however, must be wrong. *See Healy v. James*, 408 U.S. 169, 180 (1972).

The Second Circuit Court's opinion begins with the oft-quoted axiom by Thomas Jefferson: " '[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical.' " *Carroll*, 957 F.2d at 992. This quotation provides the proper mind-set for determining compelled dues cases, and at least in part, the court below followed the dictates of that axiom. However, the Constitution not only forbids massive intrusions into the freedoms of speech and association, but minor ones as well. The Second Circuit has tried to appease both sides in this case by giving both the students and NYPIRG partial victories. In matters of such grave importance, though, this Court must not sanction anything less than the full vindication of the students' constitutional rights.

This case "pits students who object to bankrolling an organization whose political speech and activities they strongly oppose, against their university, whose considered educational judgment it is that students ought to support a wide variety of campus speech, civic activism, and extracurricular activities." *Carroll*, 957 F.2d at 995. The university may well have a compelling interest in *exposing* students to various conflicting viewpoints, but it has no compelling interest in coercing *support* for those viewpoints. The court below eloquently states the importance of maintaining one's own views, free from coercion of supporting opposing views:

> [T]he freedom to keep silent as well as to speak is grounded in something broader than a national fear of the state. It is equally the product of our view of personhood, which encompasses what the Supreme Court later referred to as "freedom of thought," "freedom of mind" and a "sphere of intellect and spirit." Were there no state at all, or were it inalterably benign, our conception of what it means to be human would still lead us to respect the individual autonomy of intellect and will enshrined in the First Amendment.

Carroll, 957 F.2d at 996 (citations omitted). The court below also quoted *Abood*, that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 234-35.

In addition to this recital of the students' important speech rights, the court below bluntly states that NYPIRG engages in political speech which students are compelled to finance. *Carroll*, 957 F.2d at 997.

> [T]he transfer of funds hinges not on the ideological affinity between member and group, contributor and recipient, but rather on the compulsion inherent in conditioning registration, and hence matriculation and graduation, on payment of the fee. A student cannot pay the full fee without paying NYPIRG and he or she cannot continue as a student without paying the full fee. Whether justified or not, that is forced association and speech.

Id. The decision in this case should be easy, given the above statements. Unfortunately, the Second Circuit became bogged down in the university's excuses for consistently infringing on the students' rights.

The mandatory sponsorship of NYPIRG is intended to "expand campus speech by facilitating the activities of a wide variety of speakers." *Carroll*, 957 F.2d at 999. The court below wondered whether the mandatory fee is the least restrictive alternative. The court stressed the importance of academic freedom as a component of the First Amendment. *Id.* But what the First Amendment guarantees is the ability of scholars to research and speak unimpeded. This guarantee does not extend to forced subsidization of such research and speech.

The court below held that the three interests viewed together were sufficiently substantial to justify the infringement of the students' constitutional rights. *Carroll*, 957 F.2d at 1001. It also held that coerced contributions to NYPIRG were the least restrictive alternative to achieving those interests. *Id.* As will be shown, both the Second Circuit's premises and conclusion are wrong. The court below cites three distinct interests for SUNY-Albany's mandatory fee: (1) the general promotion of

extracurricular activities, (2) the facilitation of participatory civics training, and (3) the stimulation of robust debate on a variety of campus issues. *Carroll*, 957 F.2d at 999.

The first interest presents the most common argument made by universities: that the dissenters have the opportunity to fund groups that express their views using the mandatory fees. This remedy only compounds the constitutional problem. If this is the only recourse students have, then the only way students can mitigate the infringement of their First Amendment right not to finance an association they oppose is to increase their level of association.

The second interest applies only to those students who actively participate in NYPIRG's ventures. Those students who do not support NYPIRG's methods and causes will not participate in NYPIRG. Therefore, the students in this case gain nothing by the university's second advanced interest. The court below notes that SUNY-Albany also advances this interest by "offering courses in research, writing and government" and points out that NYPIRG "accomplish[es] substantially the same things" as the courses. *Carroll*, 957 F.2d at 1000. This sentence alone indicates that the coursework is a less restrictive alternative to compelled subsidization of NYPIRG.

The court below cites as the "most important" interest, *Carroll*, 957 F.2d at 1000, the stimulation of "uninhibited and vigorous discussion on matters of campus . . . concern." *Id.* The court suggests that without NYPIRG, the "college would be a very quiet, intellectually diminished and ultimately irrelevant place." *Id.* at 1001. The conclusion simply does not follow from the

premise. NYPIRG's activities may continue unabated without compelled student fees. The Second Circuit has allowed two issues to become intertwined, which confuses what is really a very straightforward problem. The question is *not* whether NYPIRG's speech activities will be permitted on the SUNY-Albany campus. The question is solely who will fund those activities. Because, as the court previously noted, compelled fees to fund these activities would be " 'sinful and tyrannical,' " *id.* at 992, NYPIRG may be funded only by those who do not object to that financial sponsorship.

Furthermore, forcing students to support collectively *one* point of view in representation of SUNY-Albany (through its connection to NYPIRG) does not advance the purpose of promoting debate, but frustrates it. The very purposes of compelling association in *Abood* (the need to avoid conflict and confusion that could arise if rival unions all clamored to the employers' and employees' ears, 431 U.S. at 224), and *Keller* (having more than one regulatory organization would leave attorneys unsure as to which is authoritative) are the same reasons association and speech financing should not be compelled in the university context. In regard to the funding of student political and ideological groups, students may be exposed to divergent opinion. But the university, let alone NYPIRG, is not creating a free marketplace or forum for the expression of ideas. It is requiring students to be the financial sponsors of someone else's speech. The system has nothing to do with a forum and it is certainly not free.

The court below adds as support for its position its opinion that a constant predictable flow of money to NYPIRG is an important facet of its existence, one worthy of receipt of compelled fees. Without NYPIRG, the court

frets, "students would cease to be linked by a common bond to the tolerant support of all points of view." *Carroll*, 957 F.2d at 1002. But it is precisely this state-ordered "bond" to "all points of view" that troubled Thomas Jefferson. Students should *not* be coerced to "tolerate," in the sense of financial subsidies, points of view repugnant to their own beliefs. If SUNY-Albany is truly concerned that students learn practical civics lessons, then the university would do well to let the NYPIRG supporters learn the art of inspiring voluntary donations, also known as fund raising. In real political campaigns, opponents to the message do not give money to the cause. Another message the Second Circuit and the university are delivering to students is that if you want to advance a political position and cannot find support for it, the government will simply give you the money to propagate your views. Moreover, SUNY-Albany and the court below have decided that the First Amendment has no application within the confines of a public university campus. Although the First Amendment must be honored in the workplace and in mandatory professional associations, the lesson here is that the First Amendment does not protect students. This is an illegitimate purpose for a public university.

The Second Circuit permits the coercion of fees from students to pay for viewpoints they abhor as expressed by NYPIRG, so long as "NYPIRG spend[s] as much money on activities at SUNY Albany as it takes in from SUNY Albany students via their activity fees." *Carroll*, 957 F.2d at 1002. "By allowing student money to finance NYPIRG at all we have already sanctioned a considerable infringement of [the students'] freedom from compelled speech." *Carroll*, 957 F.2d at 1002. This restriction in the

use of funds is meant to ensure that "objecting students like appellants contribute only to NYPIRG programs at SUNY Albany." *Id.* The constitutional distinction between on-campus and off-campus activities is nebulous at best, especially when the practical effect is to free up funds elsewhere for off-campus activities. No logical distinction can be drawn between coercing students to subsidize off-campus politicking and coercing students to subsidize on-campus politicking. The constitutional mandates in both cases are identical. It is little solace to objecting students that their mandatory fees will be spent on offensive messages in their own backyard as opposed to some other neighborhood.

The court below suggests that because the practice of using mandatory student fees to fund political activities is widespread, *Carroll*, 957 F.2d at 1002, this strengthens the state's interest against the students' constitutional claims. Far from strengthening the state's interest, this admission further illuminates the grave importance of this matter to students across the country. The number of students nationwide compelled to support speech which they deplore is inestimable. While amici appreciates the Second Circuit's reluctance to "micromanage the affairs of universities and their student organizations" *Carroll*, 957 F.2d at 1002, the court's mandate is to prevent any arm of the state (including a state university) from infringing on the rights of the citizenry. Reversal of the Second Circuit's opinion will not ban any type of speech from campus. It would not deny any group access and would not prevent any student from voluntarily supporting any message. What reversal *would* accomplish is the prevention of coerced subsidization of groups and speech

with which a student disagrees. This Court should act to protect their interests.

In response to *Abood*, *Ellis*, and *Hudson*, students at the University of California at Berkeley filed suit challenging the use of their mandatory student fees for political activities. In the *Smith* case, students are coerced to subsidize overtly political activities such as lobbying the state Legislature and state agencies on issues ranging from abortion funding to rent discrimination. The students have also involuntarily financially supported Amnesty International's campaign against political prisoners in Indonesia, support of gay and lesbian rights, gun control, the reelection of Congressman Ron Dellums, and a Berkeley marijuana initiative. The *Smith* plaintiffs abhor the fact that they are forced to financially assist the propagation of speech repugnant to their beliefs. By the time the case reached the California Supreme Court, *Keller* was pending before this Court. After *Keller* was decided, the state Supreme Court remanded the case back to the Court of Appeal for reconsideration in light of *Keller*. The Court of Appeal ignored the plain language of *Keller* and the apparent trend in the law to protect First Amendment rights of dissenters and determined that *Keller* had no effect whatsoever. The students appealed, and the case is again pending before the California Supreme Court. The outcome of this case will have a major effect on whether the students in *Smith* are vindicated as well as the SUNY-Albany students here.

CONCLUSION

The conflict presented by the decision of the Second Circuit Court of Appeals is clear and unmistakable. The Second Circuit has rejected the decisions of two other United States Circuit Courts of Appeals and one state Supreme Court. A similar case is currently pending before the California Supreme Court. Because the use of mandatory student fees for political purposes is so widespread, this Court may anticipate further challenges.

Like the students in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), who were required to do far more than be exposed to patriotism but support it with a raised hand, the students at SUNY-Albany have not simply been exposed to divergent views. They have been forced to reach into their pockets to support opponents' views. Ideas that could not win adherents through persuasion and reason are thus kept alive *by the state* through the imposition of fees on those that despise the ideal in question. Such an exercise of state power is the precise abuse that the First Amendment was designed to bring to an end.

Review by this Court is necessary to resolve the conflict created by the Second Circuit Court of Appeals' decision in this case and to bring students' constitutional rights in line with teachers, attorneys, nonunion workers, and other dissenting citizens. Amici curiae respectfully urge this Court to grant the petition for writ of certiorari

and reverse the portion of the judgment of the Second Circuit Court of Appeals which has been analyzed herein.

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Respectfully submitted,

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